relevant. The act of the Plaintiff pulling at the "Vee" belt was a deliberate act and even if there had been a fence or guard he would have done so.

I hold the Defendants vicariously liable for the negligence of their servant DW1 to the extent of 60% and assess the contributory negligence of the Plaintiff at 40%.

Quantum at 100% having been agreed by the parties at $10,000/- for both general and special damages, there will be judgment for the Plaintiff in the sum of $6,000/- and costs.

Order accordingly.

Solicitors: *Sri Ram & Co.; Bahari, Choy & Associates.*

TENGKU ROSLI BIN TENGKU ABDUL HAMID v. TAHIR BIN DAHURI

[O.C.J. (George J.) December 1, 1982]
[Kuantan – Civil Suit No. 283 of 1978]

Damages – Leg shortening, fracture and footdrop – Infant cyclist 50% liable – General damages $15,000 at 50% liability.

Road Traffic – Accident – Motorist to be "on guard and to anticipate" when cyclist is little boy on narrow road

The infant cyclist aged 11 collided with a motorcar as a result of which he suffered the following injuries: fracture of both femur and of the right tibia and fibula, and the severance of the tibialis anterior muscle which had caused a weakness in dorsiflexion of the right foot that gave rise to a moderate degree of footdrop. There was a reduction of girth of the right thigh, weakness of the power of the right leg and a shortening of the right leg of one inch. There was also a complaint of loss of memory. The boy's father on his behalf claimed damages against the defendant.

Held: (1) having regard to the damage to the bicycle and to the motorcar, on the balance of probabilities the court preferred the version that the boy must have swerved into the path of the car rather than the version that the motorist encroached onto the boy's side of the road;

(2) if, as in this case, the cyclist is a little boy and is riding an adult bicycle racing with other boys on a narrow road and is seen to be wobbling, the motorist should be very much on his guard and should anticipate that the boy might swerve into the path of the motorcar. The prudent motorist, in these circumstances, should sound his horn, slown down and move to keep to his extreme left. This, the defendant failed to do;

(3) having regard to the damage to the bicycle and the car on the balance of probabilities the court accepted the version that the boy swerved into the path of the car;

(4) for pain and suffering and loss of amenities arising from the above injuries, the boy was awarded $15,000 at 50% liability. There was no award as to loss of earning capacity as it was too remote and speculative. Agreed special damages awarded at 50% liability was $251.

CIVIL SUIT.

Mahindar Singh for the plaintiff.
Ang Kian Leng for the defendant.

Cur. Adv. Vult.

George J.: In this claim for damages arising from a motor accident involving a motorcar and a cyclist there are two versions of what had happened.

If the Plaintiff's version is to be accepted there has to be a finding that the front of the motorcar at about its front right headlamp came into contact with the right side of the bicycle. The Plaintiff's version was that as he was cycling on his correct side of the road the motorcar coming from the opposite direction in overtaking a motor cyclist had completely got on to its wrong side of the road and had collided with the Plaintiff. The demonstration by the Plaintiff with the use of a toy motorcar and a toy bicycle was to the effect that the front right of the motorcar came into contact with the right side of the bicycle.

If the Defendant's version is to be accepted, the impact to the bicycle has to be either to its front or to its left side. His version was that he was on his correct side of the road and the cyclist had swerved from the cyclist's left to the right and either the front of the bicycle first came into contact with the front right of the car or the left side of the bicycle was hit by the front right portion of the car.

The damage to the motorcar caused by the accident was to the front right headlamp (which shattered), to the front bumper at the right, and to the front number plate which fell off. There was also a large dent on the front right mudguard just above the front right wheel.

To ascertain the damage to the bicycle, I perused the photographs at the top of AB5 and at the top of AB6 with a magnifying glass.

The bicycle in the photograph at the top of AB6 shows that the chain wheel was not broken. However, in the photograph at the top of AB5 one gets the impression that it is broken. The conclusion to arrive at, looking at the chain wheel in both the photographs is that the bottom of the chain wheel was not broken away but was bent away from the bicycle. The impact that caused this has to have been from the left side of the bicycle. The front wheel of the bicycle was buckled in such a way that it was obvious that the pressure that caused that was from the left side of the bicycle. The photograph at the top of AB5 shows that the vertical bar of the bicycle that extends from the saddle to the pedals was damaged. Looking at the photograph through a magnifying glass one can see a definite dent in the lower third of the bar. It is again clear that this dent was caused by pressure from the left of the bicycle.

The Plaintiff's version did not fit in with impact from the left side of bicycle. Much was made about the boy giving his version of the accident on the day after the accident (which was consistent with his testimony in Court). I think that he was then simply trying to exculpate himself for the benefit of his parents and perhaps the Police. His friend Hamadan was, as a loyal friend, simply demonstrating his loyalty.

The Defendant was not clear as to which part of the bicycle came into contact with his motorcar but he did say that the boy's movements were as if he was doing a U-turn when the collision occurred.

Having the damage to the bicycle and to the motorcar in mind, on the balance of probabilities I am more inclined to the version that the boy swerved into the path of the car than with the version that the motorist encroached onto the boy's side of the road.

What must have happened at impact was, and I found as a fact that the left side of the bicycle's front wheel came into contact with the front number plate of the motorcar. The front right bumper and the front right headlamp area came into contact with the left side of the lower third of vertical bar and of the other bar leading from the pedal area to the handle car, causing the front portion of the bicycle to be forced out of the rear portion and also causing the large chain wheel to be bent outwards from left to right.

The Plaintiff must have, after the initial impact, been tossed up and must have fallen on the mudguard above the right front wheel thereby causing the dent on the mudguard. The injuries sustained by the boy must have happened at the initial impact and when he fell on to the mudguard of the car and also when he fell from there on to the road.

Now, if a cyclist is on his correct side of road and travelling in the opposite direction to a motorcar and is riding the bicycle without any indication of swerving into the other side of road (this indication could be given by *inter alia*, the behaviour of the cyclist or existence of, say, a junction with another road on the right) and then in fact swerves into the motorcar or into its path, the motorist could hardly be blamed for the accident. If however, the cyclist is a little boy and is riding an adult bicycle racing with other boys on a narrow road and is seen to be wobbling, the motorist should be very much on his guard and should anticipate that the boy might swerve into the path of the motor car. The prudent motorist, in those circumstances, should sound his horn, slow down and move to keep to his extreme left. The Defendant did not do so and when what should have been anticipated happened and the boy got into his path it was too late for the motorist to do anything to avoid the collision or at least avoid a serious impact with the cyclist.

I concluded that the boy's negligence caused the accident but the motorist was guilty of contributory negligence which I assess at 50%.

Quantum:

The Plaintiff suffered a number of injuries, the more serious of which were the fracture of both femurs and of the right tibia and fibula and the severance of the tibialis anterior muscle which has caused a weakness in dorsiflexion of the right foot that has given rise to a moderate degree of foot drop. There is a reduction of girth of the right thigh, weakness of the power to the right leg and a shortening of the right leg of one inch. There was also a complaint that there was loss of memory.

On loss of memory, it is significant that there is no medical history of concussion. Dr. Cherian Samuel in AB9 states that the lacerations on the forehead were caused by glass splinters. He never mentioned concussion.

Dr. N. Arumugasamy, the Neurosurgeon who examined the boy gave a report dated Janury 20, 1978 in which he found that the neurological examination including an EEG were that of a normal boy of the Plaintiff's age. He went on to state that it was well within the range of possibility that the boy's performance might be impaired somewhat as a result of the "head injury of the type that this patient underwent." No reference was made as to what head injury the boy suffered. To my mind, the Neurosurgeon could not have been talking of the lacerations due to glass splinters. Without a history of concussion I found it difficult to relate Dr. Arumugasamy's report to the injuries sustained by the Plaintiff in the accident of December 25, 1974.

Counsel for the Plaintiff tried to make something of the boy's showing in school. However, I have not seen any significant deterioration of the boy's performance after the accident. His examination results prior to the accident were not significantly better than his results after the accident.

Encik Mahindar Singh had argued that in assessing damages I should treat pain and suffering separately from the loss of amenities. To do so would be to deviate from the approach made by our courts in assessing damages for personal injury. No reason was put forward to support the suggestion and I see no reason to deviate from the accepted practice.

For the pain and suffering and loss of amenities arising from the fractures of both femurs and the right tibia and fibula and the severance of the muscle that caused the moderate foot drop and having in mind *inter alia* the other minor injuries and that this young boy was in hospital from Christmas day 1974 to May 4, 1975 I would award at 100% $30,000/-.

The Plaintiff was only 11 years old when this accident happened. I was asked to make an award for loss of earning capacity. The background of the Plaintiff and the nature of the permanent disabilities suffered by him makes any suggestion that it would have some effect on his earning capacity rather remote in that it is too speculative and even fanciful. I make no award under that head.

There had been agreement on special damages at 100% in the sum of $502/-.

I gave judgment for the Plaintiff as follows: Specials: $251 together with interest thereon at 4% per annum from date of accident until judgment and thereafter at 8% per annum. General damages: $15,000/- together with interest thereon at 8% per annum from date of service of writ until realisation.

The Defendant will also pay the costs of the Plaintiff as taxed at High Court scale.

Order accordingly.

Solicitors: *Mahindar & Co.; Dzaiddin & Co.*

POI KUEN MUN (f) & ORS. v. NG WEI CHOO

[O.C.J. (Mohamed Azmi F.J.) January 7, 1983]
[Seremban – Civil Suit No. 61 of 1981]

Damages – Fatal accident – Quantum agreed at $114,500 on 100% liability – Issue as to liability – Defendant's selfish attitude in hugging to centre of the road despite fact that collision clearly and reasonably forseeable – Defendant 1/3 liable for accident – Civil Law Act 1956, ss. 7 & 8

Road Traffic – Defendant's selfish attitude in hugging to centre of road – Defendant 1/3 liable for accident.

The plaintiffs (wife and parents of the deceased) were suing as dependants of the deceased. The 1st and 2nd plaintiffs were also suing in their capacity as the administratrix and administrator of the deceased's estate. They claimed for damages arising out of a fatal accident in July 1979 under sections 7 and 8 of the Civil Law Act 1956.

On that fateful day the deceased was driving his Mazda car from Labis to Segamat and the 1st defendant was driving in the opposite direction. At or near 98½ milestone Johore Bahru – Segamat road a collision occurred between the 2 vehicles on an undulating but straight stretch of road resulting in the death of the deceased.

Though it was drizzling, visibility was good at the material time. At the time of collision the Mercedes Benz was proceeding downhill and the deceased's Mazda was then trying with difficulty to overtake another car from the opposite direction due to the other car's refusal to give way. Faced with the dangerous situation the deceased frantically tried to swerve back to his left but he was unsuccessful in his attempt and thereby collided with the Mercedes Benz driven by the defendant.

General damages at $114,500 and special damages at $2,414 based on 100% liability were agreed by the parties. The only dispute was as to liability.

Held: on the issue of liability the deceased was 2/3rd to blame and the 1st defendant 1/3rd in contributory negligence. The 1st defendant was guilty of contributory negligence as the collision had been clearly and reasonably forseeable. In such a situation where the 1st defendant knew that he could have avoided the collision by swerving